covenant to repair, the landlord's duty to the public to maintain the structure in safe condition, and his retention of power to perform the duty combine to make him liable."

In the principal case it would seem that the Court of Appeals was misled by the decision in *Berkowitz* v. *Winston*.[28] That case dealt with an employee of a lessee, but the syllabus read: "Liability in tort is an incident to occupation and control; occupation and control are not reserved by an agreement to make repairs." And while the Court of Appeals recognized that this statement was limited by the facts in the case, it felt that the same rule was applicable in the case of a pedestrian. Fortunately, the Supreme Court viewed the matter in a different light, although no mention was made of the *Berkowitz* case in the opinion. It is submitted that the result reached in the principal case was entirely just and in harmony with the prevailing law in the country. It is, however, to be regretted that the court considered it unnecessary to review the status of the law on the problem. Instead, the court virtually disposes of the case with the laconic statement: *"Sic utere tuo ut alienum non laedas."* W. L. A.

Torts — Negligence — Highway Obstruction Statute Per Se Negligence — Proximate Cause

Plaintiff sustained injuries when an automobile in which he was riding as a passenger struck the defendant's freight car at a common grade crossing. Both driver and plaintiff were familiar with highway and crossing. The accident occurred at night; some witnesses said there was fog. No special precautions had been taken by the defendant to warn approaching motorists of the obstruction. Conflicting testimony indicated that the defendant's employees, engaged in a switching operation, had allowed the freight car to remain in a position blocking the highway for a period longer than the statutory five minutes. This being a violation of G.C. sec. 7472, plaintiff contended that defendant was negligent as a matter of law, and that such negligence was the proximate cause of his injuries.[1] The trial court's judgment for the plaintiff was reversed in the appellate court of the Sixth District, and final judgment entered for the defendant. Because of a conflicting deci-

[28] 128 Ohio St. 611, 193 N.E. 343 (1934).

[1] Ohio G.C. 7472: "A person or corporation . . . who obstructs, unnecessarily, a public road or highway authorized by any law of this state, by permitting a railroad car or locomotive to remain upon or across it for longer than five minutes . . . shall forfeit and pay for each offense, not less than two dollars, nor more than twenty dollars." See also General Code Section 7473 regarding liability of the railroad for damages resulting from violation of the preceding section.

sion in the Court of Appeals for the First Appellate District,[2] the cause was heard by the Supreme Court. A majority of the Supreme Court (three judges dissenting) held that there was no duty on the part of the defendant to provide further warning than the presence of the car on the crossing, that G.C. sec. 7472 was not a safety statute but a measure designed to facilitate the movement of traffic on the highways, and that the occupancy of the freight car beyond the prescribed limit was a condition and not a proximate cause of the collision.[3]

The majority holding is based upon principles generally well established in Ohio and other jurisdictions respecting a railroad's liability in collisions of this character. Conflicting views, comparatively few in number, may be reconciled largely on the basis of special circumstances.[4] But the cases, especially in those jurisdictions having highway obstruction statutes specifically applicable to railroad cars,[5] give evidence of notable disagreement regarding application of such statutes to collisions.

In the absence of a specific statute, it seems clear that there is no duty on a railroad company to provide special warnings or to take extraordinary measures to advise motorists of the obstruction of a crossing. The presence of the train is deemed sufficient notice to the driver.[6] Circumstances might be imagined, however, where the standard of due care would impose a greater obligation upon the railroad (i.e., a breakdown

[2] *Short* v. *Penna Rd. Co.*, 46 Ohio App. 77, 187 N.E. 737, 15 Ohio L. Abs. 584 (1933).

[3] *Capelle* v. *B. & O. Rd. Co.*, 136 Ohio St. 203 (1939).

[4] In *Reines, Admr'x* v. *Chicago, M., St. P. & P. Rd. Co.*, 195 Wash. 146, 80 P. (2d) 406 (1938), the court, in view of the fact that it had been recently presented with an unusual number of cases involving grade-crossing mishaps, made an analysis of 75 cases similar in character to *Capelle* v. *B. & O.*, *supra*, n. 3. In only 17 of these was the case sent to the jury. "In all others it was held that a person so unfortunate as to drive or be driven into the side of a train standing or moving over a grade-crossing, could not as a matter of law, recover from the railroad company." Of the 17 cases sent to the jury, five were violations of positive law (among which was *Short* v. *Penna Rd. Co.*, *supra* n. 2), one involved a crossing watchman not on duty, two were trap cases (i.e., lighted passenger cars hauling flat, unlighted freight cars), and the remaining nine were from five jurisdictions. In all, courts in 27 jurisdictions denied recovery.

The frequency with which collisions such as the one which gave rise to the principal case occur, is reflected in a recent survey of crossing mishaps. Statistics show that 56% of the railroad crossing accidents which happen during the night result from *cars running into trains* which have stopped upon or are moving across the highway. *Accident Facts*, 1939 Edition, National Safety Council, Inc.

[5] Comparable statutes: Ill., Smith-Hurd Rev. Stat. (1933), ch. 114, s. 70, 71; Ind., Burns' Stat. (1933), s. 10-3904; Ky., Carroll's Stat. (1936), s. 4350; Mass., Gen. Laws (1932), ch. 160, s. 151; Mich. Comp. Laws (1929), s. 11121; N.Y., Cahill's Consol. Laws, ch. 41, s. 1985; Penna., Purdon's Stat. (1936), title 67, s. 452 *et seq.*

[6] *Reed Adm.* v. *Erie Rd. Co.*, 134 Ohio St. 31, 15 N.E. (2d) 637 (1938); *C. F. Boteers* v. *Great N. Ry. Co.* (N.D.) 259 N.W. 99, 99 A.L.R. 1443 (1935); *Chesapeake & Ohio Ry. Co.* v. *Switzer*, 275 Ky. 834, 122 S.W. (2d) 967 (1938); *Bledsoe* v. *Missouri*, 149 Kan. 741, 90 P. (2d) 9 (1939); *Dolan* v. *Bremmer Rec'r.*, 220 Iowa 1143, 263 N.W. 798 (1935); *Webb* v. *Oregon-Wash. Rd. & Nav. Co.*, 195 Wash. 155, 80 P. (2d) 409 (1938).

on a hazardous crossing, during a dense fog.) The holding in the instant case is flexible enough to permit such exception: "It is conceivable that a public crossing might possess such features of inherent danger or be so dangerous at a particular time as to require a railroad company, in the exercise of due care, to take appropriate measures to protect highway travelers from colliding with a train standing on the crossing . . ." In the view of the court, no such exceptional circumstances existed in this instance.

A more tenable basis for the plaintiff's contention in the principal case lies in the allegation that the defendant's violation of G.C. sec. 7472 is negligence *per se*. It should be noted, here, that no violation of this statute is proved without a showing that the obstruction beyond the statutory period was unnecessary.[7] It is generally recognized that violation of a statute enacted for the benefit of the plaintiff is negligence *per se*.[8] Many statutes are passed with no intention to benefit individuals (i.e., revenue statutes) and a violation of such an enactment would clearly have no effect upon the question of negligence. The court, in the principal case, says that the statute invoked by the plaintiff was enacted to facilitate the movement of traffic on the highways, and not to prevent automobiles from being driven against freight cars obstructing them. It was, therefore, not a measure intended to benefit persons in the position of the plaintiff, and its violation is not an act of negligence upon which this plaintiff can predicate a recovery.[9] Where litigants have relied upon violations of similar statutes to recover damages resulting proximately from *delay*, the courts have allowed recovery.[10] Cases in this category are distinguished from the principal case on the ground that delay was the particular hazard which the legislature intended to remove, and that the enacting body contemplated a benefit to persons suffering damage therefrom.[11] The holdings in other jurisdictions are not in complete accord respecting the construction of like statutes. Many have viewed such obstruction statutes as measures to promote safety on

[7] *W. & L. E. Rd. Co.* v. *Mackey*, 53 Ohio St. 370, 41 N.E. 980, 29 L.R.A. 575, 53 Am. St. Rep. 641 (1895); *Trustees of Burton Twp.* v. *Tuttle*, 30 Ohio St. 62 (1876).

[8] *Schell* v. *Du Bois Adm'r.*, 94 Ohio St. 93, 113 N.E. 664, L.R.A. 1917A, 710 (1916).

[9] *Culbertson* v. *Warden*, 32 Ohio L. Rep. 6 (1930): "In a common law action for negligence it is prejudicial error for the court to charge the jury on negligence *per se* under General Code s. 7472 *et seq.*"

Simpson v. *Pere Marquette Ry. Co.*, 276 Mich. 653, 268 N.W. 769 (1936).

[10] *Cleveland, C., C., & St. L. Ry. Co.* v. *Taner*, 176 Ind. 621, 96 N.E. 758, 39 L.R.A. (N.S.) 20 (1911); *Patterson* v. *Detroit L. & N. Rd. Co.*, 56 Mich. 172, 22 N.W. 260 (1885); *Terry* v. *New Orleans, G. N. Rd. Co.*, 103 Miss. 679, 60 So. 729, 44 L.R.A. (N.S.) 1069 (1912).

[11] *Supra*, note 3.

the highway, and have held violations thereof to be negligence *per se*.[12] But it should be noted that where *per se* negligence has been conceded, other grounds for denying recovery have generally been found.[13] The court seems justified in its ruling that the violation of statute was not negligence *per se* with respect to this plaintiff.

It seems clear that by the construction which the court has given to G.C. sec. 7472, plaintiffs who suffer injury under similar circumstances will be unable to recover. But granting, for the moment, a negligent violation on the part of the railroad, a problem of causation (which the court deemed worthy of comment) is presented. It is elemental in the law of negligence that the plaintiff must show more than the violation of a statute enacted for his benefit. He must show that the negligent violation was the proximate cause of his injuries—or, at least, that it was a *concurring* proximate cause.[14] The court, citing *Pittsburg, C. & St. L. Ry. Co.* v. *Staley*,[15] submits that the presence of the train on the crossing was a condition, not a cause of the accident. Other courts have approached the causation problem from the same angle, reasoning that the collision could have occurred as readily within the statutory period as beyond it.[16] But, if the continuing obstruction of the highway be conceded to constitute negligence (which the court does for the sake of analysis), it is difficult to agree with the court's conclusion that the driver's negligence is, as a matter of law, *the* proximate cause of the plaintiff's injuries, and that the railroad's negligent act was merely a condition. The distinction between cause and condition does not resolve the problem of causation; it merely presents a more elusive question as to whether the defendant's negligence should be termed "cause" or "condition."[17] When two negligent acts—an unlawful obstruction of the highway and a driver's negligence—combine to produce a collision, labeling one a condition and the other a cause is of little help. Where both acts are operative at the time of impact, it seems more reasonable to conclude that *both* are proximate causes. The majority holding rests more securely upon other grounds. R. M. A.

[12] *Galveston, H. & S. Ry. Co.* v. *Marti*, (Tex. Civ. App.) 183 S.W. 846 (1916); *Penna. R. Co.* v. *Huss*, 96 Ind. App. 71, 180 N.E. 919 (1932); *Hofstedt* v. *Southern Pac. Co.*, (Cal.) 1 P. (2d) 470 (1931); *Dickey* v. *Atl. C. L. R. Co.*, 196 N.C. 726, 147 S.E. 15 (1929).

[13] *Elliot* v. *Missouri R. R. Co.*, 227 Mo. App. 225, 52 S.W. (2d) 448 (1932); *Hendley* v. *Chicago & N. W. R. Co.*, 198 Wis. 569, 225 N.W. 205 (1929).

[14] *Martin* v. *Herzog*, 228 N.Y. 164, 126 N.E. 814 (1920); *Cincinnati St. R. Co.* v. *Murray*, 53 Ohio St. 570, 42 N.E. 596, 30 L.R.A. 508 (1895).

[15] *Pittsburg, C. & St. L. Ry. Co.* v. *Staley*, 41 Ohio St. 118, 52 Am. St. Rep. 74 (1884).

[16] *Hendley* v. *Chicago & N. W. R. Co.*, *supra*, note 13; *Webb* v. *Oregon-Wash. Rd. & Nav. Co.*, *supra*, note 6.

[17] Smith, Jeremiah, *Legal Cause in Actions of Tort*, 25 Harv. L. Rev. 103, 110: ". . . the alleged distinction does not solve the question of the existence of causal relation. It is simply a restatement of the original problem in a different form of words."